

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LA CHELLE S. HENDERSON

Claimant

VS.

RUBBERMAID SPECIALITY PRODUCTS

Self-Insured Respondent

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Docket No. 1,022,527

ORDER

Respondent appeals the June 29, 2007 Award of Administrative Law Judge Nelsonna Potts Barnes. Claimant was awarded benefits for a 5 percent permanent partial disability to the right upper extremity and a 5 percent permanent partial disability to the left upper extremity after the Administrative Law Judge (ALJ) determined that claimant suffered accidental injuries to her upper extremities while working for respondent and that claimant did not suffer intervening injuries to her upper extremities in her subsequent employment.

Claimant appeared by her attorney, Randy S. Stalcup of Wichita, Kansas. Respondent, a self-insured, appeared by its attorney, Terry J. Torline of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on October 19, 2007.

ISSUES

1. Did claimant suffer accidental injuries which arose out of and in the course of her employment with respondent?
2. Did claimant suffer intervening injuries at her employments subsequent to her work with respondent so as to relieve respondent of the responsibility for these upper extremity injuries?
3. What is the nature and extent of claimant's injuries and disability?

FINDINGS OF FACT

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

Claimant began working for respondent on May 2, 2002, working 40 hours per week. Respondent soon modified the work schedules to require 12-hour days. Claimant's job required she handle a knife and hammer, remove pieces from molds, and cut, box and stack pieces. This job was hand intensive. In May or June, claimant began experiencing pain in both arms from her elbows to her fingertips. She experienced tingling, swelling and numbness in her hands and wrists. Claimant was referred to a doctor in Winfield, Kansas, and prescribed pain medication and braces for her wrists. Claimant was placed on light duty, and she continued on that duty until her last day with respondent on July 7, 2002.

In July, 2002, claimant was diagnosed with anemia and taken off work. Claimant remained on a leave of absence for a year, at which time respondent, pursuant to its policy, terminated claimant's employment. Claimant testified that after her termination from respondent, she was unemployed until 2004.¹ However, she also testified to working for Watson's Auto Sales from June 2000 to January 2004. She was also a live-in nurse in 2003 to 2004 for which she received no pay. Beginning in 2004, claimant worked as a home health care provider for different persons, a live-in nurse and a paraprofessional in a school, and she performed duties in home health, including cooking, cleaning and shopping, and as of the regular hearing, she was doing day care in her home. Claimant testified that none of the jobs she worked after her termination from respondent were as physical as the job at respondent. Claimant failed to mention her work injuries or hand problems on any job applications. Claimant testified that her hands and elbows have never stopped bothering her since her employment with respondent.

Claimant was referred by her attorney to board certified independent medical examiner Daniel D. Zimmerman, M.D., for an examination on June 8, 2006. Dr. Zimmerman diagnosed claimant with chronic tendinitis of her upper extremities at the wrist and assessed claimant a 5 percent permanent partial disability to each upper extremity based on the fourth edition of the *AMA Guides*.² He attributed claimant's disability to her employment with respondent. He testified that the duties of a home health worker were not compatible with repetitive upper extremity activities. When asked if claimant's subsequent jobs aggravated her hand problems, Dr. Zimmerman stated he

¹ R.H. Trans. at 19.

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

would have to know claimant's job duties, whether she was doing repetitive work, how much work she did and whether she was allowed breaks.

Claimant was referred by respondent to board certified neurological surgeon Paul S. Stein, M.D., for an evaluation on April 10, 2007. Dr. Stein determined that claimant had developed a cumulative trauma syndrome in her upper extremities from intensive and repetitive activities. Dr. Stein was described the activities performed by claimant with respondent and determined the work with respondent caused claimant to develop the upper extremity problems. He acknowledged that if a person had tendinitis and carpal tunnel syndrome, the activities as a home health specialist would aggravate that person's symptoms. Dr. Stein also noted if claimant had improved after stopping work with respondent and then her problems started again after working the later jobs, then the later jobs would have played a part in claimant's need for treatment. However, in order to give an opinion regarding the relative significance of various jobs worked by claimant subsequent to leaving respondent, he would need additional information regarding those jobs.³

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁴

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁶

³ Stein Depo. at 19.

⁴ K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ K.S.A. 44-501(a).

The two phrases “arising out of” and “in the course of,” as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase “in the course of” employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer’s service. The phrase “out of” the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”⁷

It is well established under the Workers Compensation Act in Kansas that when a worker’s job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.⁸

Respondent disputes that claimant suffered accidental injury arising out of and in the course of her employment. Yet, respondent provides no evidence to rebut claimant’s description of the series of microtraumas suffered while claimant worked for respondent. There is no doubt from this record that claimant suffered a series of microtraumas while employed for respondent which led to the development of tendinitis and carpal tunnel syndrome bilaterally.

In workers’ compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.⁹

Respondent contends the physical problems associated with claimant’s subsequent employments constitute intervening injuries sufficient to relieve respondent of liability in this matter. Claimant did work several jobs after leaving respondent. The activities associated with those jobs do not appear to be sufficiently traumatic to either cause or aggravate claimant’s physical problems. Dr. Zimmerman determined claimant’s job with respondent was the reason for claimant’s need for treatment and the subsequent impairments associated with her physical problems. Likewise, Dr. Stein found claimant’s job duties with

⁷ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁸ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

⁹ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

respondent to be sufficient to cause her physical problems. Both doctors agreed later job duties could cause or aggravate claimant's problems, but neither stated within a reasonable degree of medical certainty that the later jobs were specific aggravations of claimant's prior problems. Both stated they needed more information regarding the later job duties to make a definite determination regarding causation and possible aggravations. The Board does not find, from this record, that claimant suffered any permanent aggravation as the result of her later employments.

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.¹⁰

The only functional impairment opinion contained in this record is that of Dr. Zimmerman. The Board finds the 5 percent functional impairment assessed to each of claimant's upper extremities is appropriate. Therefore, the Award by the ALJ is affirmed.

CONCLUSIONS

Claimant has proven that she suffered a series of accidental injuries arising out of and in the course of her employment with respondent resulting in a 5 percent permanent partial disability to each upper extremity. Respondent has failed to prove that claimant's subsequent jobs contributed to claimant's permanent condition. Therefore, the Award of the ALJ granting claimant a 5 percent permanent partial disability to each upper extremity is affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated June 29, 2007, should be, and is hereby, affirmed.

Although the ALJ's Award approves claimant's contract of employment with her attorney, the record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should

¹⁰ K.S.A. 44-510e(a).

claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.¹¹

IT IS SO ORDERED.

Dated this ____ day of October, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
 Terry J. Torline, Attorney for Respondent
 Nelsonna Potts Barnes, Administrative Law Judge

¹¹ K.S.A. 44-536(b).